INDEX

CITATIONS

452647—42

In the Supreme Court of the United States

October Term, 1941

No. 1037

The Bridgeport City Trust Company and Arthur E. Alling, Executors of the Estate of Noyes E. Alling, petitioners

v.

Guy T. Helvering, Commissioner of Internal Revenue

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 15–21) is reported in 41 B. T. A. 191. The opinion of the Circuit Court of Appeals (R. 38–42) is reported in 124 F. (2d) 48.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 31, 1941 (R. 42–43). The petition for a writ of certiorari was filed

March 13, 1942. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The decedent created an *inter vivos* trust which provided for the payment of the net income to the decedent's three daughters, mentioned by name, and the survivors of any of them as long as any of them should live; after the death of the last survivor, the income was to be distributed to such of decedent's grandchildren as should survive his daughters as long as any of the grandchildren should live; and when all of the grandchildren should be deceased, the corpus of the trust estate was to be divided among such of the decedent's lineal descendants as should survive his grandchildren. The decedent reserved the power at any time to reallocate the disposition of the income of the trust fund, such reallocation, however, to be limited to those "named as beneficiaries" therein. The questions presented are:

1. Whether the value at the date of decedent's death of the life estates, with respect to which the decedent retained a power of reallocation, should be included in the decedent's gross estate as a transfer subject to change through the exercise of a power by the decedent to alter, amend or revoke within the meaning of Section 302 (d) of the Revenue Act of 1926.

2. Whether the decedent's power of realloca-tion embraced the life estates of his grandchildren, as well as the life estates of his daughters.[1]

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 11–14.

STATEMENT

The facts, found by the Board of Tax Appeals as stipulated (R. 16–18), may be summarized as follows:

The taxpayers are the executors of the estate of Noyes E. Alling, who died on June 19, 1934, a resident of the City of Bridgeport, Connecticut (R. 16).

On January 10, 1929, the decedent transferred in trust certain securities which, as of the date of decedent's death, had a fair market value of $138,735.12 (R. 16). The trust agreement provides in part as follows (R. 16–17):

> 1. * * * (a) To pay the net income in quarterly installments unto my daughters, Edna Alling Doherty, of Bridgeport, Conn., Madeline Alling Mason, of Bridge-

[1] Should the writ be granted, the Government would urge in support of the decision below that the value of the life estates was includable in decedent's gross estate as a transfer intended to take effect at or after death within the meaning of Section 302 (c) of the Revenue Act of 1926. The court below found it unnecessary to pass upon this contention (R. 42).

port, Conn., and Ruth Alling Barber, of Wilkes Barre, Penn., or the survivor or survivors of any of them, share and share alike, as long as they or any of them shall live.

(b) After the death of all of said beneficiaries, said net income shall be distributed unto as many of my grandchildren as shall survive my said daughters, share and share alike, as long as they or the survivor or survivors of any of them shall live.

(c) When all of said grandchildren shall be deceased, the corpus of said Trust Estate shall be equally divided among such of my lineal descendants as shall survive my said grandchildren, share and share alike, to belong to them and each of them absolutely and forever.

(d) If there should be no lineal descendants of mine who shall survive my said grandchildren, then I order and direct that the corpus of said Trust Estate be equally distributed between the Bridgeport Hospital and the Boys' Club of Bridgeport, to belong to them and each of them and their successors and assigns absolutely and forever.

2. I reserve to myself the power at any time to reallocate the disposition of the income of this said trust fund, such reallocation, however, to be limited strictly to those named as beneficiaries herein; and no such re-allocation shall be made except by

> notice in writing to be given to the Trustee hereinunder of such re-allocation.[2]

The fair market value, as of the date of decedent's death on June 19, 1934, of the life estates granted to the decedent's three daughters was $88,225.82 (R. 18). The fair market value, as of the date of decedent's death, of the life estates of the three daughters and of the decedent's three grandchildren was $120,949.28 (*id.*).

The Commissioner determined a deficiency against the estate of the decedent arising from the inclusion in the gross estate for estate tax purposes of the full value of the corpus of the trust (R. 15). The Board of Tax Appeals disapproved this determination (R. 18–21), but the court below reversed the decision of the Board insofar as it failed to include in the gross estate the fair market value, as of the date of the decedent's death, of the life interests of the decedent's three daughters and the decedent's three grandchildren (R. 38–42).

ARGUMENT

1. The court below held that the value, as of the date of the decedent's death in 1934, of the life interests in the trust with respect to which

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[2] The Connecticut Supreme Court of Errors held that the trust did not violate the rule against perpetuities (125 Conn. 599; R. 17–18). The parties stipulated and the Board found that the trust was not created in contemplation of death within the meaning of Section 302 (c) of the 1926 Act (R. 17).

the decedent had reserved a power of reallocation, should be included in his gross estate under Section 302 (d) of the Revenue Act of 1926 (Appendix, *infra,* p. 11). This decision is, we submit, clearly correct and is not in conflict with any decision of this Court or of any other Circuit Court of Appeals.

Section 302 (d) provides that there shall be included in the gross estate of a decedent the value at the time of his death of all property "To the extent of any interest therein" of which the decedent has at any time made a transfer where the enjoyment thereof was subject at the date of his death "to any change" through the exercise of a power by the decedent to alter, amend or revoke.

In the present case the enjoyment by the decedent's children and grandchildren of their interests in the trust created by him were subject at the date of his death to change by him through the exercise of a power to alter the trusts. By virtue of the reserved power of reallocation, the decedent could have limited any, or all but one, of his children and grandchildren to a nominal amount and given substantially all, if not all, of the income to one or to such of them as he pleased. The operation of Section 302 (d) is not limited to cases where the decedent reserves the power to alter each and every interest in the property transferred in trust. If the enjoyment of *any*

interest in the trust is subject to change by the decedent at the date of his death, the value of the property at the time of his death *to the extent of that interest* is by the clear and unambiguous language of the statute required to be included in the decedent's gross estate.

The decision of the court below merely holds that the value at the date of decedent's death of those interests, the enjoyment of which was still subject to the control of the decedent, should be included in his estate. This ruling is in complete accord with *Chickering* v. *Commissioner,* 118 F. (2d) 254 (C. C. A. 1st), certiorari denied, October 13, 1941, No. 153, present Term; *Millard* v. *Maloney,* 121 F. (2d) 257 (C. C. A. 3rd), certiorari denied, October 13, 1941, No. 324, present Term; *Guggenheim* v. *Helvering,* 117 F. (2d) 469 (C. C. A. 2nd), certiorari denied, October 13, 1941, No. 125, present Term; *Commissioner* v. *Chase Nat. Bank,* 82 F. (2d) 157 (C. C. A. 2nd), certiorari denied, 299 U. S. 552; *Holderness* v. *Commissioner,* 86 F. (2d) 137 (C. C. A. 4th); and *Hoblitzelle* v. *United States,* 3 F. Supp. 331 (C. Cls.).

The decision of the court below is not, as alleged by the petitioners, in conflict with the decision of the Court of Appeals for the District of Columbia in *Helvering* v. *Helmholz,* 75 F. (2d) 245, or with the decision of this Court in that case, 296 U. S. 93. A similar allegation of conflict was made in the petitions for certiorari in *Chickering* v. *Com-*

missioner, supra, and in *Millard* v. *Maloney, supra,* but in both cases this Court denied the writ. In the *Helmholz* case the decedent had made a transfer in trust naming herself as one of the beneficiaries and reserving to herself as a beneficiary the right to join with all the other beneficiaries in terminating the trust. This Court held that such a power was not to be considered as a power to "alter, amend, or revoke" the trust within the meaning of Section 302 (d). That holding is not opposed to the conclusion of the court below, for, to the extent that the right to recall in that case was conditioned upon the consent of all the beneficiaries, the transfer was in effect an absolute one.

The petitioners refer, as did the petitioners in the *Chickering* and *Millard* cases, *supra,* to the fact that in the *Helmholz* case the decedent had the right by will to appoint her husband as the recipient of the income for the duration of his life and that that right was exercised by the decedent. The petitioners argue that this Court was cognizant of the decedent's reservation of a power of appointment over the income of the trust fund and that the Court must have decided that the reservation of the power of appointment over the income of the trust was not within the provisions of Section 302 (d). However, as shown by the opinion of the Court of Appeals for the District of Columbia in the *Helmholz* case, 75 F. (2d) 245,

248, the Commissioner did not appeal the Board's holding that the life interest in the income of the trust estate appointed to the husband should not be included in the decedent's gross estate. An examination of the briefs filed in this Court shows that no argument was made that either the existence or exercise of the power of appointment brought the trust property within Section 302 (d). The holding in that case must be confined, therefore, to the issue actually decided, namely, that the power of a grantor who is also a beneficiary to join with the other beneficiaries in terminating the trust is not a power to "alter, amend, or revoke" the trust within the meaning of Section 302 (d).

McFadden v. *United States,* 20 F. Supp. 625 (E. D. Pa.), cited by the petitioners (Pet. 8), was not appealed by the Government. The main ground of the decision in that case was that the right which the decedent reserved was to direct the shares of income to be paid to his wife and children *during his lifetime only* and that the shares of those who were to take income and principal after his death were definitely fixed and vested by the provisions of the deed of trust at the time it was executed. It is true that the court stated that, even if the decedent had reserved a power to change the shares of income which his wife and children should receive after his death, this alone would not appear to be such

a power to alter or amend as the statute contemplates. But this statement is, we believe, clearly inconsistent with the later decision of the Circuit Court of Appeals for the Third Circuit in *Millard* v. *Maloney, supra.*

2. The petitioners presented the alternative argument in the court below that the decedent reserved a power of reallocation only with respect to the interests of his three children and in their petition for certiorari they seek to reserve that point for argument on the merits if the writ is granted by this Court. But the question of the construction of the particular trust instrument is of no general importance and the decision below on the point is, we believe, plainly correct. The question, therefore, is not one which warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL 1942.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *.

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *.

* * * * *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, inter-

> ests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.
>
> * * * * *

Section 302 (c) of the Revenue Act of 1926 was amended by the Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516, and further amended by Section 803 of the Revenue Act of 1932, c. 209, 47 Stat. 169, in respects not material to the present case. Section 302 (d) of the Revenue Act of 1926 was amended by Section 401 of the Revenue Act of 1934, c. 277, 48 Stat. 680, in respects not material to the present case.

Treasury Regulations 80 (1934 edition):

> ART. 15. *Transfers during life.*—The following transfers made by the decedent during his life, by trust or otherwise, other than bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax: * * * (4) transfers in which the decedent retains, either alone or in conjunction with any person or persons, the right to designate who shall possess or enjoy the property or the income thereof, if made after the enactment of the Revenue Act of 1916 (see article 19 and the exceptions stated therein); and (5) transfers made before or after the enactment of the Revenue Act of 1916 in which the enjoyment of the transferred property was subject at decedent's death to any change through the exercise, either by decedent alone or with other person or persons, of a power to alter, amend, or re-

voke, or if after the enactment of the Revenue Act of 1916 such a power was relinquished by the decedent in contemplation of death (see articles 20 and 21).

The value of transferred property includible in the gross estate is the value at the date of decedent's death. If a portion only of the property is so transferred as to come within the terms of the statute, only a corresponding proportion of the value of the property should be included in the gross estate. If the transferee makes additions to the property, or betterments, the enhanced value of the property at date of decedent's death, due to such additions or betterments, should not be included.

* * * * *

ART. 19. *Transfers with right retained to designate who shall possess or enjoy.*—(*a*) *Transfers included.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer, by trust or otherwise, in connection with which the decedent retained, either to himself alone or in conjunction with any other person or persons, the right for his life, or for a period ascertainable only by reference to his death, or for a period of such duration as to evidence an intention that such right should continue throughout his life, to designate the person or persons who should possess or enjoy the transferred property (in whole or in part), or any of the income thereof. (See article 15.)

(*b*) *Taxability.*—Such a transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), in connection with which the right so to designate is limited to pos-

session, enjoyment, or income for the period of decedent's life, or one ascertainable only by reference to his death, or for one evidencing intent that it should extend for at least the duration of decedent's life, is taxable if made subsequent to the enactment of the Revenue Act of 1916.

If, however, the right to designate is not so limited, but is subject to such an exercise as would determine the ultimate disposition of the property or any part thereof or interest therein, then to that extent the transfer is taxable whether made before or after the enactment of the Revenue Act of 1916.

The provisions of the first paragraph of this subdivision are subject to the same exception as stated in subdivision (*b*) of article 18.

ART. 20. *Power to change enjoyment.*—The value of the property transferred, other than by a bona fide sale for an adequate and full consideration in money or money's worth, constitutes a part of the gross estate, whether the transfer was made before or after the enactment of the Revenue Act of 1916, if at the time of the decedent's death the enjoyment thereof was subject to any change through a power, exercisable either by the decedent alone or in conjunction with any person, to alter, amend, or revoke.

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